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The Airport Noise Act: Safe Harbor or Procedural Hurdle?

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Almost twelve years ago, Congress enacted the Airport Noise and Capacity Act of 1990 (Noise Act),[1] which was intended to establish a national noise policy that would bring federal oversight to what was perceived as a patchwork of local airport noise and access restrictions and accordingly would reduce the disputes over noise that were impeding airport development projects. The Noise Act created a scheme of requirements for restricting aircraft based upon the level of noise and the financial implications of such restrictions on aircraft operators. This scheme included a 10-year phaseout of the largest Stage 2 aircraft—the noisiest planes in the commercial fleet. Congress allowed airport operators to restrict Stage 2 aircraft, particularly smaller planes not subject to the phaseout, if they prepared a traditional cost-benefit analysis of the proposed restriction and provided for public comment and a six-month advance notice. However, Congress prohibited local restrictions on Stage 3 aircraft—newer, quieter models—without the approval of all airport users or the Federal Aviation Administration (FAA). The scope of the Noise Act and its 1992 implementing regulations has been put to its first test in Naples, Florida.

The Naples Airport Stage 2 Ban

The Naples Municipal Airport is, in many respects, typical of small commercial and large general aviation airports throughout the country. It is located near residential neighborhoods and caters primarily to recreational and business aircraft, with only limited scheduled passenger service. Most commercial service to the area takes place at nearby Southwest Florida International Airport in Fort Myers.

Because of short runways and runway pavement limitations, the airport never handled large aircraft and so did not receive noise benefits from the nationwide phaseout of larger Stage 2 aircraft. To the contrary, noise has increased in the past decade because of continued operation of smaller Stage 2 aircraft (the useful life of which can extend 30 years or more) and increases in general aviation activity, particularly fractional ownership program jet activity.[2] The growth trend that smaller airports like Naples experienced during the last decade is projected to continue, particularly as the popularity of fractional jet ownership programs increases and the introduction of new, smaller jet aircraft makes corporate flying affordable for more companies. The inconvenience and uncertainty caused by new security requirements at major commercial airports during the last six months also are partly responsible for recent, unprecedented traffic increases at Naples and similar airports.

The dilemma the Airport Authority faced was not unusual: Although the Authority was convinced that growth of the facility was in the long-term economic interest of the region, local opposition based on noise impacts threatened to impede or abort aviation objectives. For several decades, the Naples Airport Authority was at the forefront of efforts to balance the competing needs of airport users with those of the surrounding community and adopted numerous measures to control noise and limit incompatible land uses surrounding the facility.

After years of study, the Airport Authority determined that a ban on Stage 2 aircraft would further promote that balance. The Authority projected that a Stage 2 ban would reduce the number of people exposed to high noise levels by more than 90 percent, with minimal effects upon operations. This solution—rather remarkably—was endorsed by both local aviation supporters and community leaders. In June 2000 the Authority adopted a ban on Stage 2 aircraft and became the first airport operator in the country to adopt a restriction pursuant to the Noise Act and its implementing regulation, Part 161.[3]

The restriction at Naples is important not only because it is the first but also because it is the subject of several challenges, the results of which may prove precedential for other airport operators' efforts to address local noise issues. Three interrelated but distinct legal questions have been raised by the Authority's Stage 2 ban. The first is whether the Stage 2 ban is constitutional under case law established since the Supreme Court's decision in *Burbank v. Lockheed Air Terminal*.[4] The second is whether the Stage 2 ban was adopted in compliance with the Noise Act and Part 161. The third issue is whether the Stage 2 ban is consistent with the Authority's contractual commitment to the federal government, by way of its federal grant assurances, to provide open access to the airport.

Constitutional Issues

Just days before the Stage 2 ban was to have gone into effect on January 1, 2001, two aviation industry groups, the National Business Aviation Association (NBAA) and the General Aviation Manufacturers Association (GAMA), sued in federal court, alleging that the restriction was unconstitutional under the Supremacy and Commerce Clauses. NBAA and GAMA argued that the ban was preempted by federal law, imposed an undue burden on interstate commerce, and was unreasonable and there-

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fore unconstitutional because the Authority improperly relied upon the potential benefits of the ban in residential areas exposed to noise at levels lower than those considered significant by the FAA.[5] Thus, they argued, the Authority is prohibited from designing a restriction intended to benefit residents who are not, according to the federal guidelines, significantly affected by aircraft noise.

The Authority defended the restriction by arguing that its actions could not violate the Supremacy or Commerce Clauses because the Noise Act contains a direct and explicit grant of power for airport operators to adopt local restrictions on Stage 2 aircraft. Further, the Authority asserted that the ban was imminently reasonable because it would significantly reduce the noise levels in the community while imposing only a minimal burden on the current and projected users of the Naples Airport.

On cross motions for summary judgment, the court upheld the Authority's restriction as constitutional.[6] The court took issue with the premise that preemption is based upon the unreasonableness of a restriction:

> [The Noise Act], and more particularly 49 U.S.C. § 46524(b), *expressly permits* airport operators to ban Stage 2 aircraft, subject to certain requirements. The NBAA contends that these requirements include reasonableness and nondiscrimination, and that the Authority has not met those latter requirements, and that the ban is therefore pre-empted. But federal preemption is a limitation on state power, not the manner in which that power is exercised. If the Supremacy Clause prohibits a state from taking a particular action, it simply cannot do so, no matter how reasonable or rational that action might be.[7]

The court did not end the inquiry at this point but instead evaluated the reasonableness of the Stage 2 ban on the basis that reasonableness could be construed to be a component of Commerce Clause analysis. Most importantly, the court examined in depth the argument that the FAA established the standard of reasonableness for local noise restrictions by setting a threshold of significant noise impacts. The court rejected the assertion that this threshold creates a federal standard of reasonableness and concluded that an airport proprietor could address those noise impacts it believes are worthy of consideration, regardless of federal guidelines:

> If Congress or the FAA had intended to preclude local authorities from considering noise levels below 65 dB DNL in making an access restriction decision, either could easily have done so. They did not. In addition, review of Appendix A [to Part 150] makes it clear that it was not intended to prevent airport operators—governmental or private—from considering any particular noise impact or determining that a land use deemed acceptable by the FAA is unacceptable to local residents.[8]

The court further concluded that the plaintiffs failed to show that the Authority had violated the procedural requirements of the Noise Act, Part 150 and Part 161, and failed to disprove the essential finding of the Authority's study—that Stage 2 operations, however minimal, accounted for a hugely disproportionate share of residents' noise complaints.[9]

Finally, the court noted that Commerce Clause analysis, like Supremacy Clause analysis, might not be necessary in assessing local Stage 2 restrictions because "Congress approved both the proprietor exception under which the Authority acted, and the process by which the Authority banned the remaining Stage 2 craft. *As a result, the actions taken by the Authority cannot violate the Commerce Clause.*"[10]

Although courts for decades have asserted and assumed that restrictions on aircraft operations will be preempted if found to be unreasonable, arbitrary, or unjustly discriminatory, the district court in the Naples Airport case was the first to address the effect of the Noise Act on this analysis. The court questioned whether this type of balancing, commonly performed only in the Equal Protection context, has a place in preemption analysis where, as here, a federal law expressly recognizes the local power at issue. In essence, the court concluded that Congress in the Noise Act expressly authorized airport operators to adopt restrictions on Stage 2 aircraft so long as the power is exercised in the manner contemplated by federal law.

The case is important on two grounds. First, as the first federal court decision on the scope of the Noise Act, it establishes an important precedent that compliance with the Noise Act should give airport operators a safe harbor against Supremacy Clause and Commerce Clause scrutiny. Second, the decision resolved the question whether the FAA established a standard for noise impacts such that airport operators are barred from taking action to address noise occurring below that level. By emphasizing the advisory nature of the FAA guidelines, the decision reinforces the flexibility that airport operators have long pursued in tailoring their noise mitigation programs to local expectations about the acceptable level of noise impacts.

Compliance with the Noise Act

Under the Noise Act, the FAA does not have a formal approval role with respect to local restrictions on Stage 2 aircraft. Nevertheless, the agency has made it clear that it intends to assert a significant role as the protector of the process, to ensure that airport operators comply fully with the Noise Act and Part 161. Through informal guidance and published letters to airport operators, the FAA has aggressively attempted to assert informal control over the studies mandated by Part 161 as a precondition to local airport restrictions.[11]

Although the FAA has no formal approval role in local restrictions on Stage 2 aircraft, it intends to protect the compliance process.

The FAA was predictably aggressive with the Naples Airport Authority. When the Airport Authority completed the required Part 161 study in June 2000, the agency provided extensive comments and later initiated an enforcement action on the basis that the Airport Authority had failed to comply fully with the Part 161 procedures. In an effort to resolve the enforcement action informally, the Airport Authority agreed to prepare a supplement to its Part 161 study and to provide an additional opportunity for public comment. At the end of that supplemental process, the FAA informed the Airport Authority that the Authority had complied with the Noise Act and Part 161. For the first time since the Noise Act and Part 161 were adopted, the FAA formally stated that the Author-

ity had satisfied the requirements for adopting a restriction on Stage 2 aircraft. Although the FAA's acknowledgement of compliance with Part 161 was not legally required, the Authority believed that the FAA's endorsement provided valuable reassurance that it could lawfully implement the Stage 2 ban.

Many airport operators have started Part 161 studies only to face substantial opposition from the FAA. Unlike other airport operators, however, the Naples Airport Authority declined to abandon its intentions to implement the Stage 2 ban in the face of FAA opposition. Instead, the Authority decided to respond substantively to each FAA criticism of its study and its proposed restriction. The Authority prepared a supplemental study that assembles in a single document the information the Authority had collected on reasonable alternatives to the Stage 2 ban and reviews exhaustively the costs and benefits of the ban itself.[12] If the Naples study becomes a model for future Part 161 studies, it will teach airport operators that compliance with the Noise Act is exceedingly complex, time consuming, and costly.

The FAA's Naples Airport Notice of Investigation presents an important precedent for how local noise rules will be adopted in the future.

Airport Improvement Program Grant Assurances

In October 2001 the FAA informed the Airport Authority that it had complied with the Noise Act requirements; the same day, the FAA sent a formal Notice of Investigation pursuant to Part 16 asserting that the Naples Airport Stage 2 ban violated the Authority's contractual commitments to the federal government under the Airport Improvement Program.[13] These contractual commitments, known as grant assurances or sponsor's assurances, are prescribed by federal law. The FAA cannot make federal grant funds available unless an airport or sponsor makes assurances, and the FAA can terminate eligibility for grant funding if it concludes that the operator is violating any grant assurance.

The thrust of the FAA's argument is that the Stage 2 ban is unreasonable and discriminatory. The FAA asserted in its Notice of Investigation that it was not bound by the federal court decision on this issue because it was not a party to that litigation. While the federal court decision was limited to the constitutional issue and did not directly address grant assurances, the court could not have found that the Naples rule passed constitutional preemption scrutiny without also concluding that the rule was reasonable and nondiscriminatory under the statutory provisions that authorize the FAA's grant assurances.[14]

The FAA's formal investigation is pending at this writing. If the FAA finds that the Stage 2 ban violates any of the Authority's grant assurances, the Authority will be ineligible for federal grant funds and, potentially, ineligible to seek approval of a passenger facility charge. However, three levels of administrative review must be completed before an airport operator can obtain judicial review of the FAA's decision.

The FAA investigation marks the first time the agency has brought an enforcement action against an airport operator for adopting a local restriction pursuant to the Noise Act. The FAA's action is particularly noteworthy because the same legal issues in the administrative enforcement action have been decided in other forums. The agency previously determined that the Authority complied fully with the Noise Act, and the federal court determined that the Stage 2 ban is constitutional. In so finding, the court concluded that the Naples rule did not run afoul of any federal statutory scheme, like the grant assurances, that might preempt the Stage 2 ban. How the FAA proceeds in the investigation and what legal justification it offers for revisiting issues already substantively addressed in other fora will establish important precedents for airport operators in the future.

Does the Noise Act Provide a Safe Harbor?

The essential question raised by the FAA's latest enforcement action concerns the relationship between the Noise Act and other federal statutes governing local airport restrictions. Does the Noise Act provide a safe harbor such that compliance with the statute and regulations provides an airport operator the assurance that it can lawfully implement a restriction on Stage 2 aircraft? Although the federal court has suggested that the Noise Act does provide a safe harbor, the FAA's Notice of Investigation asserts the opposite.

Resolving this question requires an understanding of the Noise Act, Part 161, and their history. In enacting the Noise Act, Congress clearly intended to impose some control on the proliferation of local noise rules. Congress drew a bright line between the newest generation Stage 3 aircraft and noisier Stage 2 aircraft. As Senator Wendell Ford (D-KY), a primary sponsor of the legislation, explained, one of its purposes was to make Stage 3 "the nationally acceptable noise standard" and to "strike a balance between local concerns, national air transportation and the need for protection of Stage 3 aircraft."[15] The statute accordingly imposes stringent limitations on the ability of airport operators to restrict Stage 3 aircraft, including, most importantly, a requirement that any such restriction be approved by the FAA—and then only if the agency can find, based upon "substantial evidence," that six statutory conditions have been satisfied.[16]

The statutory scheme is entirely different for local restrictions on Stage 2 aircraft. First and most obviously, Congress directed the retirement of all Stage 2 aircraft above 75,000 pounds by December 31, 1999. Second, Congress provided fundamentally different treatment for local restrictions on Stage 2 aircraft than for restrictions on Stage 3 aircraft. Congress did not provide for an FAA approval process. Instead, the statute allows a local noise restriction on Stage 2 operations so long as the airport operator publishes the proposed restriction and allows for a public notice and comment period. The six statutory conditions for FAA approval of a Stage 3 restriction are not prerequisites for Stage 2 restrictions.

Although Congress mandated the phaseout of large Stage 2 aircraft, it did not ignore Stage 2 aircraft under 75,000 pounds. At the passage of the Noise Act, it directed the FAA to prepare a report to determine regulatory requirements that should apply for local restrictions on these Stage 2 aircraft.[17] The FAA's report, issued in June 1991, noted that some industry groups argued for imposing stringent federal approval requirements, as a prerequisite to local restrictions on small Stage 2 aircraft, to echo the statutory requirements that expressly apply to Stage 3 restrictions. The FAA rejected such an approach and instead

decided that the intent of Congress would best be served if the agency were to "afford all Stage 2 aircraft the same treatment whether or not they are above or below 75,000 pounds."[18]

In addition to defining clearly the FAA's role in review and approval of local noise restrictions, Congress also addressed the relationship between the Noise Act and other preexisting legal requirements. The FAA has asserted that the relevant provision of the Noise Act should be interpreted to mandate the continued application of all preexisting laws and requirements, including statutes prescribing the grant assurances. The FAA's view apparently is that Congress intended for the Noise Act to impose additional procedural requirements but not to disturb the requirements that allow the FAA to determine in the first instance whether an airport operator has imposed a restriction that is unreasonable or discriminatory. The relevant provision of the Noise Act is now codified at 49 U.S.C. section 47533: "Except as provided by section 47524 of this title, this subchapter does not affect—(1) law in effect on November 5, 1990, on airport noise or access restrictions by local authorities." The FAA interprets this provision as express recognition that *both* constitutional standards and the agency's preexisting oversight role for airport noise restrictions survived the Noise Act.

The language, however, is susceptible to another reading wherein the Noise Act requirements *replaced*—and did not merely supplement—previously applicable legal requirements for local restrictions on Stage 2 and Stage 3 operations.

The FAA relies upon the language that the Noise Act "does not affect" laws that were in effect prior to its enactment "on airport noise or access restrictions by local authorities" but ignores the introductory clause, "*Except as provided by section 47524.*" Section 47524 sets forth the procedural and substantive requirements for adopting restrictions on Stage 2 and Stage 3 aircraft. The contrary reading of this provision is that section 47533 reflects the intent of Congress that section 47524 is an exception to the general rule and would *supercede* preexisting laws concerning local noise restrictions. Under this reading of the statute, compliance with the Noise Act (and the FAA's implementing regulations) would allow sufficient authority for an airport operator to adopt a restriction on Stage 2 aircraft.

Although the language of section 47533, standing alone, might be susceptible to both interpretations, the legislative history raises serious doubt that the FAA's interpretation is correct. In a colloquy between Senators Frank Lautenberg (D-N.J.) and Wendell Ford on the Conference Report concerning the Noise Act, the members discussed precisely the situation presented by the FAA's Notice of Investigation in Naples:

> Senator Lautenberg: With regard to the modified proposal [in the House version of the bill], I ask the Senator from Kentucky if he would confirm these points to be true: . . . that, *under this proposal, an airport operator would be allowed to impose restrictions on stage 2 operations, without the approval of the FAA, and without risking the loss of AIP money.*
>
> Senator Ford: *The Senator is correct* . . . He has made the case for his constituents, and I believe that we have taken the steps in this legislation to protect the efforts that he has been making to reduce aviation noise in New Jersey.[19]

What this exchange demonstrates is that the key Senate sponsors did not intend for the FAA to use other statutory authorities—like the authority to enforce grant conditions under the Airport Improvement Program—to exercise either *de jure* or *de facto* review of the substance of an airport operator's Stage 2 restriction. The FAA thus should not be able to use its grant assurance enforcement process as an indirect means of approval or disapproval of a noise restriction.

Conclusion

As should be clear from the text and legislative history of the Noise Act, the FAA's Part 16 Notice of Investigation concerning the Naples Airport Stage 2 restriction presents an important precedent for how local noise rules will be adopted in the future. If the FAA's interpretation of the Noise Act is correct, compliance with Part 161 and the Noise Act will be little more than a burdensome procedural step with little substantive value for airport operators. The FAA essentially will have approval authority over any local restriction, regardless whether the restriction affects Stage 2 or Stage 3 aircraft. Given the FAA's long-standing and clear opposition to local noise rules, if the agency has *de facto* approval power for local Stage 2 restrictions through the Part 16 mechanism, airport operators would be prudent to assume that such restrictions are going to be extraordinarily difficult to implement.

If, however, the FAA has misread the Noise Act, its Notice of Investigation is a serious overreaching by the agency. The agency would be disturbing a congressionally mandated safe harbor for airport operators to adopt local restrictions on Stage 2 aircraft. Not only has the Naples Airport Authority completed the study mandated by the Noise Act, but the agency also has specifically found that the Authority has complied fully with those requirements. In this instance, the only remaining hurdle—that the restriction not run afoul of constitutional limitations—was satisfied when the federal district court found that the Stage 2 ban at Naples Airport survived constitutional scrutiny. In many respects, the ultimate outcome of the Naples dispute will provide guidance for the adoption of future airport noise restrictions.

Notes

1. 49 U.S.C. §§ 47521-47533.

2. Airport noise is generally measured using a metric known as DNL to report average annual noise exposure. The metric includes a double weighting for nighttime noise (between 10 p.m. and 7a.m.) to account for people's greater sensitivity to noise at night. The extent of an airport's noise problem is generally expressed as the number of people or land area exposed to noise in excess of a defined DNL level. FAA regulations set forth the formula for calculating DNL levels and require airports to use the DNL metric in most circumstances for measuring the extent of nearby noise exposure. *See* 14 C.F.R. pt. 150.

3. 14 C.F.R. pt. 161.

4. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); British Airways v. Port Auth. of N.Y. & N.J., 558 F.2d 75 (2d Cir.) modified by 564 F.2d 1002 (2d Cir. 1977); Santa Monica Airport Ass'n. v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981); Nat'l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81 (2d Cir. 1998); Am. Airlines, Inc. v. Dep't. of Transp., 202 F.3d 788 (5th Cir. 2000).

5. *See* 14 C.F.R. pt. 150, App. A.

6. Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth., 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

7. *Id.* at 1352 (emphasis added).

8. *Id.* at 1351.

9. *Id.* at 1353.

10. *Id.* at 1354 (emphasis added; citations omitted).

11. The FAA maintains an Internet site that collects significant guidance it has provided to airports on the scope of Part 161, *available at* www.faa.gov/arp/app600/14cfr161/161guid.htm.

12. The Authority's so-called Supplemental Study is available on the Naples Airport Authority website, www.flynaples.com

13. *See* 49 U.S.C. § 47107(a), 14 C.F.R. pt. 152, App. D; FAA Order 5190.6.

14. Although not often made explicit, the courts generally conclude that restrictions that are unreasonable, arbitrary, or unjustly discriminatory violate the Supremacy Clause under conflict preemption theories. Several courts and the FAA have made the point explicitly that local regulations that violate grant assurance obligations, 49 U.S.C. § 47107(a)(1), are preempted. *See, e.g., United States v. New York*, 552 F. Supp. 255, 265 (N.D.N.Y. 1982) ("It is clear then that [the local restriction], since it conflicts with a federal statute and the will of Congress, is repugnant to the Constitution, and, therefore, a nullity"); Directors Determination, *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, Docket Nos. 16-98-05, 13-94-25, 13-95-03, 1998 FAA LEXIS 1131 *64, *citing New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157 (2nd Cir. 1989).

15. 136 Cong. Rec. S13619 (Sept. 24, 1990).

16. 49 U.S.C. § 47524(c)(2).

17. 49 U.S.C. § 47525.

18. FAA, *Study of the Application of Noise and Analysis Requirements to Operating Noise/Access Restrictions on Subsonic Jets Under 75,000 Pounds* (June 1991), at *i*, 16.

19. 136 Cong. Rec. S17543 (Oct. 27, 1990) (statements of Senators Lautenberg and Ford) (emphasis added).

Proactive Role for FAA

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airport development projects. Salutary provisions for environmental protection have been an integral part of the federal program to fund airport improvements since the 1970s. For example, the FAA may only approve a grant for a major airport development project that has a potentially significant impact on natural resources if there is no possible and prudent alternative and the project includes reasonable steps to minimize the harm. Reasonable steps to minimize the harm are included as mitigation commitments in the FAA decision and any subsequent grant agreements. These mitigation measures are eligible for AIP funding as part of the cost of the airport development project.

In addition to federal environmental laws, similar state and local laws apply. Many states, including California, Massachusetts, Minnesota, and Washington, have mini-NEPA statutes requiring state environmental impact reports for airport capacity projects. California has the most far-reaching state process.

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Need for New Runways and Complex Challenges

AIR-21, signed in April 2000, provides a $40 billion aviation authorization for three years and ensures that all revenue credited to the aviation trust fund is spent on aviation capital programs. In an attempt to address concerns about why it takes so long for a new runway to be built, Congress considered the inclusion of an environmental streamlining provision in that legislation similar to the provision that had been in the surface transportation legislation. The provisions enacted did not go so far. Section 310 of AIR-21 required the FAA to study federal environmental requirements related to the planning and approval of airport improvement projects. The study was to focus on the level of coordination among federal and state agencies, the role of public involvement, the staffing and other resources needed, and the time for conducting such reviews.[3] In response to this requirement, the FAA submitted a report to Congress on May 18, 2000, that not only analyzed the environmental process in the context of airport development but contained a number of initiatives to streamline the process.

What the study found was that the issues affecting the length of time it takes to build a new runway (10 years, on average) are as complex as the reasons an aircraft might be delayed in reaching its destination. Of the 10-year average, the FAA's environmental review takes approximately three and a quarter years. Much non-environmental planning work, such as assessment of the capability of the current facilities, evaluation of demand forecasts and the options available to accommodate that demand, terminal and ground access